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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONELL ENGLISH, Defendant and Appellant.	G039290 (Super. Ct. No. 02NF3526) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kazuharu Makino, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent

* * *

Donnell English (appellant) appeals from the denial of his petition for writ of error *coram nobis*. We appointed counsel to represent him on appeal. Counsel filed a brief that set forth the facts and procedural history of the case. Counsel presented no argument for reversal but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. We granted appellant 30 days to file a supplemental brief. In his responsive filings, appellant contends he received ineffective assistance of counsel. He asserts his midtrial guilty plea to three counts of child molestation was based on his attorney's concern for the well-being of one of the child victims and a broken promise to vigorously protect his interests during sentencing proceedings. Based on our independent review of the record, counsel's brief, and appellant's supplemental brief, we conclude the trial court correctly denied appellant's petition for writ of error *coram nobis* and therefore affirm the judgment.

I

FACTS

In September 2003, during the jury trial on charges appellant committed three counts of lewd acts with a minor (Pen. Code, § 288, subd. (a))[1], appellant entered into a negotiated plea agreement following the testimony of one of the child victims and before the second child victim, his daughter, was to testify. In exchange for his guilty plea and admission to a "strike" prior (see § 667, subds. (d)-(e)(1)), the trial court sentenced appellant to a 12-year prison term. As was noted in our prior unpublished opinion, "The plea was entered although the factual basis was disputed, pursuant to *North Carolina v. Alford* (1970) 400 U.S. 25." (*People v. English* (June 29, 2005, G033163) [nonpub. opn.], p. 2.) Appellant's trial counsel and the court referred to *People v. West* (1970) 3 Cal.3d 595 as a legal basis for appellant's guilty plea to a disputed factual basis,

[1] All further undesignated statutory references are to the Penal Code.

and appellant agreed to "plead guilty to the *West*." Although contested, appellant stipulated to the trial court's consideration of the preliminary hearing transcript and appellant's admission as recorded on the *Tahl*[2] form as evidence of the existence of a factual basis to support the plea. Appellant indicated that he wanted to avoid having his daughter testify against him, and he agreed that the negotiated plea was in his best interest.

Approximately three weeks later, appellant sent a letter to the trial court indicating that he wished to withdraw his plea on the grounds that his attorney had coerced the plea and that he was in fact "not guilty." Appellant sent additional letters to the trial court, including at least two entitled "Motion to Withdraw Plea." In late November 2003, appellant filed a section 1170, subdivision (d) request to recall sentence.[3] Again, appellant claimed he had been coerced by his attorney into entering a guilty plea.

The trial court denied appellant's motion to recall sentence without returning him to court. The court took no action on appellant's many letters or his requests to withdraw his guilty plea. His appeal from the judgment was dismissed on the grounds appellant failed to obtain a certificate of probable cause and because the

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[2] See *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122.

[3] Section 1170, subdivision (d) states that when "a defendant . . . has been sentenced to be imprisoned in the state prison . . . the court may, within 120 days of the date of commitment on its own motion . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." This provision permits "a recall of sentence *at the postcommitment stage* and constitutes 'an exception to the common law rule that the court loses resentencing jurisdiction once execution of sentence has begun. [Citations.]' [Citation.]" *People v. Howard* (1997) 16 Cal.4th 1081, 1093, quoting *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.)

appellate record was insufficient to determine if appellant was entitled to file a motion to withdraw the plea. (*People v. English, supra,* at pp. 8-9.)

In October 2006, appellant filed a notice of motion and "Motion to Set-Aside, Vacate[,] the Conviction and Sentence[,]" which also challenged the validity of his guilty plea. This motion was subsequently denied by the trial court. Appellant's petition for writ of habeas corpus filed in this court was summarily denied. (*In re Donnell English* (Oct. 19, 2006 G037559).)

In August 2007, appellant filed a petition for writ of error *coram nobis* in the trial court. The petition was accompanied by appellant's declaration and numerous exhibits, all of which, he asserts, supported his ineffective assistance of counsel claim. The trial court denied appellant's petition for writ of error *coram nobis* on August 24, and he filed a notice of appeal from this ruling on September 18.

II

DISCUSSION

In his many letters and motions, appellant repeatedly asserts that his attorney mislead and coerced him into pleading guilty during the jury trial. However, "[*c*]*oram nobis* will not issue to vacate a plea of guilty solely on the ground that it was induced by misstatements of counsel [citation] or where the claim is that the defendant did not receive effective assistance from counsel. [Citations.]" (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983.) "The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]" (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474; see also *People v. Shipman* (1965) 62 Cal.2d 226, 230.)

Not once has appellant claimed to have new evidence "which would have prevented the rendition of the judgment." (*People v. Soriano, supra,* 194 Cal.App.3d at p. 1474.) Nor has he submitted any exculpatory evidence let alone evidence which could not have produced at trial. While appellant repeatedly asserts he is innocent of all charges, he has failed to provide any evidence, other than his own self-serving declaration, to support this assertion. He claims various witnesses could have testified on his behalf, but it appears every witness he identified was known to him before the jury trial commenced. In short, appellant attempts to rely on unsupported accusations to undo a facially valid plea agreement.

At the time appellant entered his guilty plea, he believed that pleading guilty for a specified 12-year prison term was in his best interest. Although appellant developed "buyer's remorse" within a couple of weeks of his change of plea, nothing in the record supports his challenge to the validity of this agreement. Likewise, nothing in the record undermines our confidence in the validity of the trial court's ruling on appellant's petition for writ of error *coram nobis*. Thus, we find no error in the judgment.

III

DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.